

**United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C.**

Date: December 15, 1997

Case No: 96 INA 339

In the Matter of:

THOMAS DANN,
Employer,

On Behalf of:

GREGORIA MASANGKAY,
Alien

Appearance: L. F. Salgado, Esq., of Washington, D. C.

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of GREGORIA MASANGKAY (Alien) by THOMAS DANN (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at Philadelphia, Pennsylvania, denied the application, Employer requested review pursuant to 20 CFR § 656.26.¹

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the Employer's responsibility to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On January 25, 1995, Employer applied for certification to permit him to employ the Alien on a permanent basis as a "Household Manager (Live-in)" to perform the following duties in his household:

Residence has 3,500 Sq. Ft. Supervises & coordinates activities of household contractors such as electrician, appliance repairers, housekeeper, gardener, plumber, etc. Plans all menus for family and visitors, places orders and supervises caterers for parties. Purchases food and cleaning supplies. Handles checkbook for household expenses and keeps records of expenditures. Is responsible for all items and garments that need to be sewn, dry cleaned or disposed of. Decorates the house for children's parties, or other entertainment events. Takes care of the purchasing of the children needs, like clothes, medicines. Take children to doctors to doctors appointments, make sure they follow the doctor's instructions.

This was a forty-hour a week job, beginning daily at 9:00 A.M., and ending 5:00 P.M. The rate of pay was \$9.35 per hour, with time and a half for overtime.² The position was classified as "Housekeeper (Household Manager)" under DOT Code No. 301.137-010. Although the application (ETA 750A) did not specify the education

²Other Special Requirements were good work references, no smoking or drinking, able to work overtime on short notice, good personal hygiene, written verification of previous experience, and speak and write English. AF 66. The household consisted of two adults and two children living in an 8 room house. The children were girls, aged two years and ten months, respectively. The Alien was 49 years old at the time of application and had a high school education. She lived in the Employer's home where she was Household Manager from September 1994 to the date of application. She previously had worked for a household in Manila, Philippines, where she was Cook and Household help from 1965 to 1976, and in Tokyo, Japan, where she was employed as Cook for an American family from 1988 to 1989.

needed, it required applicants to have two years of experience in the Job Offered or in the Related Occupation of House Cook. AF 66.

Notice of Findings. On October 30, 1995, The Notice of Findings (NOF) CO advised that certification would be denied, subject to the Employer's rebuttal. Noting the DOT job description, the CO observed that part of the job conditions was that this employee, "Works in residence employing large staff."³ The CO explained that the application did not contain sufficient information to permit a determination as to whether the Alien will perform Housekeeper duties on a full time basis. The CO said the Employer must sustain the burden of proving that the position described in this application exists and that, as performed in Employer's household, the job will provide full time employment. The CO then described in detail the evidence the Employer is required to produce to prove that this is a full time position, stating explicit requests for specific facts, and requiring answers to a series of questions that were designed to elicit information addressing this issue. AF 54-55.⁴

Rebuttal. On December 7, 1995, the Employer filed a rebuttal in which he furnished relevant documents and answers to questions posed in the NOF. AF 44-52.

Final Determination. On February 15, 1996, the CO denied certification on grounds that the Employer failed to prove that the position at issue constituted permanent, full time employment within the definition at 20 CFR § 656.3(a). The CO summarized the findings in the NOF and Employer's rebuttal. AF 30-31. The CO then explained why the rebuttal was inadequate to support alien labor certification under the Act. AF 32.

Relying on DOT job criteria specifying that a Housekeeper supervises a large staff, the CO commented that the duties of a House Worker, General, under DOT No. 301.474-010, more closely

³DOT No. 301.137-010 HOUSEKEEPER, HOME (domestic ser.) alternate titles: **manager, household.** Supervises and coordinates activities of household employees in a private residence: Informs new employees of employer's desires and gives instructions in work methods and routines. Assigns duties, such as cooking and serving meals, cleaning, washing, and ironing, adjusting work activities to accommodate family members. Orders foodstuffs and cleaning supplies. Keeps records of expenditures. May hire and discharge employees. Works in residence employing large staff.

⁴See **Ramsinh K. Asher**, 93 INA 347 (Nov. 8, 1994) as to an employer's burden of proving that a position is permanent and full time. See also **Gerata Systems America, Inc.**, 88 INA 344 (Dec. 16, 1988); and see **Collectors International, Ltd**, 89 INA 133(Dec. 14, 1989) as to an employer's obligation to provide the specific information the CO reasonably requests to aid in determining whether a position is permanent and full time.

match the functions documented in the rebuttal than does the work of a Housekeeper (Household Manager), as described in the DOT at No. 301.137-010.⁵ After examining the Rebuttal answers to the NOF questions, the CO concluded, "Even though you have stated the need for the employee to supervise your household, you have not shown that you have a full time need for a Housekeeper, Home." AF 32.

Appeal. On March 19, 1996, the Employer appealed from the denial of certification. AF 01-27.⁶ Employer argued that the job title should not be controlling, contending that the duties and responsibilities of the job should be determine its nature.

The Employer admitted that the job duties in his application do fit the needs of a residence that employs a small staff rather than a large one. The Employer argued, however, that both positions require equivalent skill levels to perform the duties stated. The Employer further argued that even though his needs fall into a "grey area" in that he does not have a large staff in the traditional sense, he nevertheless can demonstrate the need for a household manager. Employer argued that the CO must adjust to "the real world needs of the employer," citing 20 CFR § 656.21 (b)(2)(i). In further argument, Employer said that the position of House Worker, General, does not fit the responsibilities contemplated by the job stated in the application. As these arguments relied for support on the documents and "declarations" that were appended to the Employer's appeal, it is relevant to observe that such new evidence cannot be considered in this appeal. **Cappriccio's Restaurant**, 90 INA 480 (Jan. 7, 1992).

DISCUSSION

⁵ **301.474-010 HOUSE WORKER, GENERAL** (domestic ser.) alternate titles: housekeeper, home. Performs any combination of following duties to maintain private home clean and orderly, to cook and serve meals, and to render personal services to family members: Plans meals and purchases foodstuffs and household supplies. Prepares and cooks vegetables, meats, and other foods according to employer's instructions or following own methods. Serves meals and refreshments. Washes dishes and cleans silverware. Oversees activities of children, assisting them in dressing and bathing. Cleans furnishings, floors, and windows, using vacuum cleaner, mops, broom, cloths, and cleaning solutions. Changes linens and makes beds. Washes linens and other garments by hand or machine, and mends and irons clothing, linens, and other household articles, using hand iron or electric ironer. Answers telephone and doorbell. Feeds pets. GOE: 05.12.18 STRENGTH: M GED: R3 M2 L2 SVP: 3 DLU: 86.

⁶ Incorporated in Employer's appellate argument was a significant reference to a home on the Eastern Shore in Maryland, suggesting that the work of the Housekeeper would encompass supervision of household employees at that location, as well. AF 07. As this discussion was not supported by Appellate File evidence, it will not be considered.

It is relevant in the context of this case that the evidence the CO directed Employer to produce was required to clarify the distinction between a "household worker" and a "housekeeper." For this reason, it is found that the CO's request for specific information regarding the Employer's job opening was reasonable and that Employer's answers to the NOF questions inquiries were duly considered by the CO in reaching the Final Determination. **Dr. Daryao S. Khatri**, 94 INA 016 (Mar. 31, 1995).

The Employer did not contend that the position he offers is entirely consistent with the occupational description in the DOT. He contends, however, that he has proven his business necessity under all of the facts of this case. The CO found that the functions of the position at issue more closely resembled the duties of a Household Worker than those of a Housekeeper, and concluded that the Employer failed to establish that a full time job existed for a Housekeeper. We agree with the CO.

Even accepting Employer's evidence and arguments that he needs a worker to perform some of the duties of a Housekeeper, there is not sufficient evidence that he has shown that a full time job exists for a worker whose sole or primary function would be the work of a housekeeper, as that position is described in the DOT. Because the record contains sufficient evidence to support the inferences that the CO has drawn, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

